

Social Theory Meets Social Policy: Culture, Identity and Public Information Policy After September 11

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ABSTRACT

Notwithstanding recent events that might be thought to create an atmosphere especially hospitable for increases in federal government secrecy, government initiatives favoring the withholding of information have been accompanied by other moves in the direction of greater openness. In his introduction to a symposium on "Federal Secrecy After September 11 and the Future of the Information Society," the author suggests that the politics of post-September 11 information policy debates may be complicated, in part, by social developments that are affecting the non-instrumental cultural values Americans associate with access to information. Specifically, information and communications technologies are enabling and sustaining an unprecedented degree of active participation for "ordinary" individuals in the creation of culture and of social meaning, and thus fostering conditions opposed to the assumptions about authority, categorical coherence, and the susceptibility of information to isolation that have historically made government secrecy seem both legitimate and practicable. These developments do not mean that openness will or should in principle prevail over secrecy in all debates regarding public information policy. But they render the political terrain for proponents of secrecy rougher to the extent that these social changes make secrecy regimes seem more alien and unnatural in the information society.

"Government openness" or "access to public information" is the sort of public good that one would expect to be under-produced because of well-known collective action problems in democratic systems. Although access to government information yields predictable benefits of many kinds, these benefits are likely to be relatively diffuse among individual voters. Important institutions – most notably, the press – may pursue openness policies out of some form of self-interest.

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But that does not mean voters will care enough about government openness to cast ballots based on that issue. Where the disclosure of information threatens some sort of focused harm or impediment to political or economic interests who are attentive and well-organized, one might expect, following rational choice theory, that the forces opposed to openness would have a considerable advantage in battles over government information policy, and elected policy makers will be disproportionately responsive to their interests.

The retreat towards greater federal government secrecy that America has endured for the last five years seems consistent with this observation. And yet, it does not tell the full story. We are simultaneously witnessing at least some critical moves towards improved access, and prospects exist for a significant intensification of popular interest in government openness. The opposing moves may not be equivalent. There may not be, for every new restrictive government practice, an equally powerful move in the opposite direction. Yet the story is not monolithic, notwithstanding recent events that might be thought to create an atmosphere especially hospitable for increases in secrecy. The most notable of these were of course the monstrous attacks of September 11, 2001.

There are many possible reasons why this political terrain is so complex, many of which may be entirely contingent and ephemeral, and many of which may be well explained in terms of the instrumental self-interest of the relevant political actors. The post-September 11 information society, however, is also being shaped in part by a different sort of phenomenon, namely, a change in the non-instrumental cultural values associated with access to information. Put simply, technological changes are fostering a cultural milieu in which increasing numbers of Americans are more likely to regard access to information as significantly constitutive of their identity as Americans, wholly apart from the practical significance of such information. Such cultural values would not themselves insure the ultimate triumph of openness over secrecy in every information policy contest, and perhaps they should not. But their vitality would suggest that the goal of openness will remain more influential in the development of information law and policy than rational choice theory would alone suggest.

Interpreting information law and policy debates in light of identity and cultural values draws insights from the seminal information age social theory of Daniel Bell and Manuel Castells.¹ Their work

¹ See text at notes 37-51, *infra*. At the risk of stating the obvious, an essay this brief cannot do justice to the nuances of Professor Bell's sociology or explore the relationships among technology, information and identity with anything like the scope or depth of Professor

provides an important lens through which to see contemporary developments. Moreover, it provides a helpful context within which to introduce this special issue of *I/S* on "Federal Secrecy After September 11 and the Future of the Information Society." The articles on this topic that follow this introductory essay were written in response to a call for papers made possible with the support of The Century Foundation, which received a grant from the John S. and James L. Knight Foundation to promote scholarly inquiry into the impacts of government secrecy. *I/S* is deeply grateful for this support. Rather than provide a conventional precis of each article, however, I will refer to each in passing while advancing the thesis of this essay.

I. MOVES TOWARD SECRECY AND OPENNESS

Evidence abounds of the increasing trend towards federal government secrecy over the last five years. In the year following the September 11 attacks, the government classified 11.3 million documents, which jumped to 14.2 million the following year and 15.6 million the year thereafter.² The increase in pages classified was accompanied by a substantial drop, since fiscal year 2001, in the number of previously classified pages that the government declassified.³ Agencies removed government documents from web sites and publicly available databases, severely limiting the public's ability to assess environmental and other risks.⁴ The government also resorted increasingly to statutory exemptions to deny requests for records sought under the Freedom of Information Act (FOIA).⁵ According to a study of 22 agencies by the Coalition of Journalists for Open Government, the use of FOIA exemptions to deny requests

Castell's three volume study, *THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE* (2000). I have likewise made no effort in this essay to explore the differences in their social models. Nonetheless, I think it important to note where I have borrowed their insights, which substantially inspired the discussion that follows.

² David Nather, *Classified: A Rise in 'State Secrets'*, 63 CQ WEEKLY 1958, 1960 (2005).

³ *Id.* at 1965.

⁴ John Podesta, *Need to Know: Governing in Secret*, in *A LITTLE KNOWLEDGE: PRIVACY, SECURITY AND PUBLIC INFORMATION AFTER SEPTEMBER 11*, 11, 13-14 (Peter M. Shane, John Podesta, and Richard C. Leone, eds., 2004); Laura Gordon-Murnane, *Shhh!!: Keeping Current on Government Secrecy*, *SEARCHER: THE MAGAZINE FOR DATABASE PROFESSIONALS*, Jan. 2006, at 35, 36.

⁵ 28 U.S.C. § 552 (2000).

jumped by 22 percent between the years 2000 and 2004, even though the total number of FOIA requests to these agencies, the largest-volume handlers of FOIA requests, dropped by 13 percent.⁶ Most surprisingly, the increase had no apparent connection to national security. Use of FOIA Exemption 1,⁷ which protects classified information, actually dropped during this same period.⁸

As has been widely observed, the Bush Administration's pursuit of increased secrecy was very much in evidence prior to the September 11 attacks and is rooted in its expansive view of plenary executive authority.⁹ A dramatic indication of the Administration's stance was its refusal to disclose, on grounds of executive privilege, the members of Vice President Dick Cheney's Task Force on Energy Policy.¹⁰ President Bush also wasted little time in amending the executive order concerning the release of records under the Presidential Records Act, in order to slow the release of historical records from the Reagan Administrations.¹¹ His amendments provided, among other things, that a former vice president – in this case, President Bush's father – could claim executive privilege to prevent the disclosure of vice presidential records; in addition, executive privilege in general could be invoked by the non-governmental designee of a former President, such as Reagan, who had become incapacitated and unable to claim executive privilege himself.¹² The Administration's expansive views

⁶ COALITION OF JOURNALISTS FOR OPEN GOVERNMENT (CJOG), WHEN EXEMPTIONS BECOME THE RULE (undated document), at 2-3, available at http://www.cjog.net/documents/Exemptions_Study.pdf (last visited Feb. 16, 2006).

⁷ "This section does not apply to matters that are-(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order..." 5 U.S.C. § 552(b)(1) (2000).

⁸ CJOG, *supra* note 6, at 3.

⁹ See generally U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM MINORITY STAFF, SECRECY IN THE BUSH ADMINISTRATION (Sept. 14, 2004), available at <http://www.democrats.reform.house.gov/Documents/20050317180908-35215.pdf> (last visited Feb. 16, 2006).

¹⁰ *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004); Bruce P. Montgomery, *Congressional Oversight: Vice President Richard B. Cheney's Executive Branch Triumph*, 120 POL. SCI. Q. 581 (Winter 2005-06).

¹¹ Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 5, 2001).

¹² *Id.* at 56,028.

of its constitutional right to secrecy were matched by its views on the implementation of open government statutes. Attorney General Ashcroft issued a memorandum on October 12, 2001 emphasizing the willingness of the Bush Justice Department to defend any agency's decision not to disclose information under FOIA, unless its invocation of an exemption "lack[s] a sound legal basis."¹³ The Ashcroft memo replaced a 1993 Clinton Administration policy establishing a presumption of disclosure under FOIA, and the willingness of the Attorney General to defend nondisclosure decisions only when "the agency reasonably foresees that disclosure would be harmful to an interest protected by [the relevant FOIA] exemption."¹⁴ Although the Ashcroft memo made no mention of national security, it was followed in March, 2002, by a memorandum to heads of executive departments and agencies from the President's Chief of Staff encouraging them to protect from release any information that they deemed to be "sensitive but unclassified."¹⁵

In the wake of September 11, Congress lent its support in critical ways to the trend towards secrecy. The USA PATRIOT Act¹⁶ significantly expanded the authority of the executive branch to engage in covert law enforcement and intelligence operations. It broadened the scope of private records that may be obtained without notice through third parties, who themselves are forbidden to disclose the fact of any such search.¹⁷ It increased the availability of so-called "sneak and peak" warrants for searches that do not entail the seizure of property.¹⁸ It lowered the bar for obtaining secret warrants for foreign

¹³ Memorandum from John Ashcroft, Attorney General, for Heads of all Federal Departments and Agencies: The Freedom of Information Act (Oct. 12, 2001), *available at* <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm> (last visited Feb. 16, 2006).

¹⁴ Memorandum of Attorney General Janet Reno for Heads of Departments and Agencies Re: the Freedom of Information Act (Oct. 4, 1993), *available at* <http://www.fas.org/sgp/clinton/reno.html> (last visited Feb. 16, 2006).

¹⁵ Andrew H. Card, Jr., Assistant to the President and Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies re: Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), *available at* <http://cio.doe.gov/Documents/wh031902.html> (last visited Feb. 16, 2006).

¹⁶ USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁷ *Id.* § 215, 115 Stat. at 287-88 (2001).

¹⁸ *Id.* § 213, 115 Stat. at 286 (2001).

intelligence searches from the Foreign Intelligence Surveillance Court.¹⁹

More directly relevant in terms of general public access to information, Congress amended the Freedom of Information Act to mandate the nondisclosure of so-called critical infrastructure information voluntarily submitted to federal agencies.²⁰ The mandate covers information “not customarily in the public domain and related to the security of critical infrastructure or protected systems,”²¹ and can be used to hide from public view environmental or safety risks, the disclosure of which would prove embarrassing to private firms. In one truly odd case involving the apparent misuse of this authority, the Brick Township Municipal Utilities Authority in New Jersey denied a resident’s request for access to an electronic map of the town’s land parcels on the ground that the map had successfully been submitted to the U.S. Department of Homeland Security as critical infrastructure information. The Authority was willing, however, to sell the resident a paper copy of the same map.²²

Yet more extreme secrecy proposals exist. For example, under a proposed Biodefense and Pandemic Vaccine and Drug Development Act of 2005, now pending in the Senate, Congress would create in the Department of Health and Human Services a new agency – the Biomedical Advanced Research and Development Agency – to coordinate and accelerate advanced research into potential countermeasures against biomedical threat.²³ Under the proposed Act: “Information that relates to the activities, working groups, and advisory boards of the BARDA shall not be subject to disclosure under section 552 of title 5, United States Code, unless the Secretary or Director determines that such disclosure would pose no threat to national security.”²⁴ This change would effectively reverse the ordinary FOIA presumption in favor of disclosure²⁵ and allow the

¹⁹ *Id.* § 218, 115 Stat. at 291 (2001).

²⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, § 214(a)(1), 116 Stat. 2152 (2002) (to be codified at 6 U.S.C. § 133).

²¹ *Id.* § 212(3), 116 Stat. 2151 (2002).

²² OMB Watch, First Public Case of Critical Infrastructure Information (Aug. 8, 2005), <http://www.ombwatch.org/article/articleview/2977> (last visited Feb. 16, 2006).

²³ S. 1873, 109th Cong. (2005).

²⁴ *Id.* § 3 (proposing to add 42 U.S.C. § 319L(f)(2)).

²⁵ 5 U.S.C. § 552(a)(4)(B) (2002).

agency to bypass classification as the appropriate process for protecting national security-related information from inappropriate disclosure.

Still, this is not the whole story. In organizing White House oversight of the executive branch regulatory process, President Bush left in place an executive order promulgated by President Clinton that significantly increased the transparency of that process.²⁶ The Clinton Order required the Office of Management and Budget (OMB) to maintain a publicly available log containing the status of all pending regulatory actions under White House review, notations of communications from OMB to the agency, and the “names of individuals involved in all substantive oral communications” between the Office of Information and Regulatory Affairs and “any person not employed by the executive branch.”²⁷ Although this provision does not close all avenues to possible off-the-record conversation between the White House and special interests on regulatory matters, OMB now makes this information available, via its web site, despite the Reagan Administration’s successful legal claim nearly 20 years ago that none of this material is subject to mandatory disclosure under FOIA.²⁸ This is clearly a positive development.

In a similar vein, the Administration has organized what is called the “eRulemaking Initiative.”²⁹ Among its goals has been the development of a centralized government-wide docket management system for government rulemaking that allows members of the public “to access and search all publicly available regulatory material, such as Federal Register notices and rules, supporting analyses, and comments submitted by the public.”³⁰ Although, strictly speaking, this initiative

²⁶ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *as amended by* Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002).

²⁷ *Id.* § 6(b)(4)(C).

²⁸ *Wolfe v. Dep’t of Health and Human Services*, 839 F.2d 768 (D.C. Cir. 1988) (en banc) (information concerning status of FDA regulations in OMB review process exempt from mandatory FOIA disclosure because it is protected by deliberative privilege).

²⁹ Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 ISJLP 1, 2-8 (2005).

³⁰ Regulations.gov, *Welcome to the eRulemaking Initiative*, <http://www.regulations.gov/fdmspublic-rel11/custom/jsp/navigation/about.jsp> (last visited Feb. 8, 2006).

does not increase the number of documents potentially available to the public, it so enhances the practicability of obtaining those documents as to count as a significant step forward in government openness.

There has also been bipartisan movement in Congress towards the goal of government openness. Republican Senator Jon Conryn and Democratic Senator Patrick Leahy are co-sponsoring the "Openness Promotes Effectiveness in Our National [OPEN] Government Act of 2005," which would impose a variety of management reforms to improve agency responsiveness to FOIA requests.³¹ The bill also proposes to amend FOIA³² so that no statute enacted subsequently could be deemed to imply legal authority to withhold records under FOIA Exemption 3 unless the statute provided such authority in explicit terms.³³ This would make it more difficult for agencies to claim legal authority to withhold records and would require Congress to decide more conspicuously whether categories of records would or would not be disclosable under FOIA.

It seems apparent from these latter developments that the emerging pattern of government information policy cannot be regarded in an undifferentiated way as for or against openness. While the record of the Bush Administration may tilt decisively towards secrecy, it has taken at least some steps towards openness, and has even retreated on at least one pro-secrecy initiative.³⁴ Likewise, despite the seeming ease with which Congress went along after September 11 with Administration recommendations for less disclosure, congressional sentiment among Republicans, as well as Democrats, is diverse on issues concerning freedom of information. This has been especially evident in congressional resistance to permanent reauthorization of all provisions of the USA PATRIOT Act.³⁵

³¹ S. 394, 109th Cong. (2005).

³² *Id.* § 8 (proposing to amend 5 U.S.C. § 552(b)(3) (2000)).

³³ "(b) This section does not apply to matters that are—(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.*

³⁴ "Last year, the Department of Homeland Security tried to require employees to sign non-disclosure agreements that would have barred them from sharing even unclassified information with the public. The department threatened to search offices to make sure no one broke the rules. It backed down in January under pressure from the two major unions that represent employees of the department." Nather, *supra* note 2, at 1961-1962.

³⁵ In December 2005, a Senate vote on the permanent reauthorization of all provisions of the

Many reasons for the vigor of pro-openness values in debates over federal policy are undoubtedly rooted in the self-interest of politically salient actors. Access to information may enhance the political position of members of Congress, just as it may serve the instrumental interests of outside constituencies. One can expect the institutional press and university researchers to campaign vigorously for access to government records as a means of facilitating their work. Public interest groups organized around specific substantive concerns, such as environmental protection or public health issues, may be expected to push for government openness as instrumental in monitoring the agencies that they seek to influence most directly.

A critically important set of constituents in this respect may be state and local governments. As Ryan Lozar argues in his commentary, "Federal Secrecy and the States: The Impact of Information Closures on Local Government Operations," federal secrecy policy may impair the capacity of government officials at other levels to address public needs most effectively, thus weakening their own political position.³⁶ Given the close relationships state and local officials routinely enjoy with members of Congress, one would expect them to provide a frequently effective voice on the side of sharing government information.

Yet, the press and the nonprofit community are apparently of the view that the attractiveness of "openness values" reaches more broadly than individual self-interest alone would suggest. In March, 2005, the American Association of Newspaper Editors (AANE), backed by a grant from the John S. and James L. Knight Foundation (which is also backing this symposium), launched its first national "Sunshine Week" campaign to raise public awareness of access to government issues. Over 750 participants, including journalism groups, media companies, state press associations, open-government and First Amendment advocates, librarians, civic groups, educators and student journalists participated through their writings or involvement in local events.³⁷

USA PATRIOT Act was forestalled by a successful filibuster staged by 41 Democrats, 1 Independent, and 5 Republicans. Michael Sandler, *Only Brief Extension of Anti-Terrorism Law*, 63 CQ WEEKLY 3394, 3394 (2005).

³⁶ Ryan Lozar, *Federal Secrecy and the States: The Impact of Information Closures on Local Government Operations*, 2 ISJLP 103 (2006).

³⁷ Information about Sunshine Week events appears at a web site created by the AANE for this purpose. See Sunshineweek.org, <http://www.sunshineweek.org> (last visited Feb. 16, 2006) (the list of 2005 participants is available at Sunshineweek.org, *Sunshine Week 2006 Expands Push For Open Government*, <http://www.sunshineweek.org/sunshineweek/y2funding> (last visited Feb. 16, 2006)).

Although it is clear why many of these actors would have the incentive to direct energy towards influencing government officials, the scope of these events strongly suggests a serious expectation that the themes articulated and values expressed would resonate widely with the general public, even at a time of profound public concern about national security. The AANE was sufficiently encouraged by its success to plan another national Sunshine Week for March, 2006.

This background does not suggest any algorithm, of course, by which to predict how specific future information policy contests will work out. Every battle over access to records at any level of government occurs in its own political context and affects its own discrete set of organized interests. Yet, if we look at how our culture is evolving, and especially at how information technology is pushing that culture, then these disputes may turn out to implicate more than the array of those forces for or against increased openness who have concrete interests at stake and whose incentives are shaped in a measured way by those incentives. Arguments for secrecy may face an increasingly uphill battle because Americans perceive their entitlement to information as entailed in their very identity as American citizens living in the information age. That identity is shaped, I believe, by forces that go beyond either self-interest, narrowly defined, or even by popular allegiance to conventional democratic values.

II. INFORMATION AGE SOCIAL IDENTITY AND CITIZEN ENTITLEMENT TO INFORMATION

In his magisterial interpretation of society in the information age, Manuel Castells defines "identity" as "the process by which a social actor recognizes itself and constructs meaning primarily on the basis of a given cultural attribute or set of attributes, to the exclusion of a broader reference to other social structures."³⁸ Castells cites Craig Calhoun for the proposition that identity plays a "decisive role . . . in defining politics in contemporary American society,"³⁹ and Alain Touraine for the yet more ambitious assertion that:

[I]n a post-industrial society, in which cultural services have replaced material goods at the core of production, it is the

³⁸ MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 22 (2d ed. 2000).

³⁹ *Id.* (quoting CRAIG CALHOUN, *SOCIAL THEORY AND THE POLITICS OF IDENTITY* 4 (1994)).

defense of the subject, in its personality and in its culture, against the logic of apparatuses and markets, that replaces the idea of class struggle.⁴⁰

Taking these propositions as starting points, I want to argue for the possibility that political disputes over access to government information may prove to be important terrain for witnessing how individuals engage in Touraine's "defense of the subject." That is, we may be entering a period in which individual citizens cast ballots and organize politically around the issue of government openness not because of self-interest, narrowly defined, but in order to assert a certain way of understanding themselves. The association individuals make between their personal identity and an individual entitlement to public information may be rooted increasingly not only in considerations of instrumental utility, but also in the cultural meaning that access to information acquires.

In sketching this hypothesis, I find it helpful to start with a conception of social structure articulated by Daniel Bell, our seminal theorist on the nature of post-industrialism. In *The Cultural Contradictions of Capitalism*⁴¹ and a recent edition of his classic *The Coming of Post-Industrial Society*,⁴² he sets forth a conception of society that suggests how struggles over the values at play in contests over government information policy may be structured.

Bell's theory rejects the position that society is best understood as an integrated, holistic system or web of systems.⁴³ Instead, he describes society in terms of three disjunctive realms, which he calls the techno-economic structure, the polity, and the culture. As explained by Bell:

⁴⁰ *Id.* (quoting ALAIN TOURAINE, QU'EST-CE-QUE C'EST LA DÉMOCRATIE? 168 (1994) (translated by Castells).

⁴¹ DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976) [hereinafter *CULTURAL CONTRADICTIONS*].

⁴² Daniel Bell, *The Axial Age of Technology – Foreword: 1999*, *THE COMING OF POST-INDUSTRIAL SOCIETY* ix (Special Anniversary ed. 1999) [hereinafter *POST-INDUSTRIAL SOCIETY*].

⁴³ *Id.* at xviii-xix; *CULTURAL CONTRADICTIONS*, *supra* note 41, at 10.

The techno-economic order is concerned with the organization of production and the allocation of goods and services. It frames the occupation and stratification system of the society and involves the use of technology for instrumental ends. . . .

The polity is the arena of social justice and power: the control of the legitimate use of force and the regulation of conflict . . . in order to achieve the particular conceptions of justice embodied in a society's traditions or in its constitution, written or unwritten. . . .

I mean by culture . . . the realm of symbolic forms and . . . more narrowly the arena of *expressive symbolism*: those efforts, in painting, poetry, and fiction, or within the religious forms of litany, liturgy, and ritual, which seek to explore and express the meanings of human existence in some imaginative form.⁴⁴

Although none of these realms dictates the others, that is, "there are no simple, determinate relations among the three realms,"⁴⁵ they experience interrelated development. Thus, for the past 500 years, the trajectory of Western civilization, in Bell's view, has been increasingly to situate the individual person as the critical social unit in each of these realms.⁴⁶ This evolution has been accompanied by a preoccupation in every realm with "the new," and with the capacity of individuals to master the world and remake themselves.⁴⁷

The overlap does not mean that the more specific values projected in each realm of society are consistent. Individualism in the techno-economic order realized itself in the form of the "bourgeois entrepreneur."⁴⁸ In culture, society has seen the rise of the "independent artist," and "in its extreme form...the idea of the untrammelled self."⁴⁹

⁴⁴ CULTURAL CONTRADICTIONS, *supra* note 41, at 11-12.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 16.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Although these figures and impulses arose simultaneously, they are antagonistic:

[T]he extraordinary paradox is that each impulse . . . became highly conscious of the other, feared the other, and sought to destroy it. Radical in economics, the bourgeoisie became conservative in morals and cultural taste. The bourgeois economic impulse was organized into a highly restrictive character structure whose energies were channeled into the production of goods and into a set of attitudes toward work that feared instinct, spontaneity, and vagrant impulse...The cultural impulse...turned into rage against bourgeois values.⁵⁰

As Bell sees it, by the 1970s, the values of culture had become supreme.⁵¹ There is not space here to attend to all the nuances of his argument, but, in at least one sense, I would want to insist (and Bell does not contradict this) that there is still a clear disjunction. That is, the techno-economic order is still primarily instrumental; it still deploys technology for instrumental ends, and is characterized in general by hierarchical structures in which higher levels are held legitimately to exercise control over lower levels. The realm of culture, by contrast, is still – as Bell says – “a continual process of sustaining an identity through the coherence gained by a consistent aesthetic point of view, a moral conception of self, and a style of life which exhibits those conceptions. . . .”⁵² The economy, in other words, aims at production. Culture aims at meaning.

If we conceptualize society this way, then it seems fairly straightforward that the values most supportive of government arguments for control of information are values that resonate chiefly in the techno-economic order. The case on behalf of secrecy is that society wants the production of a good – call it “national security” – for which the President and his bureaucracy have been made the production managers. The information they possess that is relevant to this good is something akin to government property, and they are best situated to deploy that information for the effective production of the good that society wants. It hardly seems a coincidence that President

⁵⁰ *Id.* at 17.

⁵¹ *Id.* at 33.

⁵² *Id.* at 36.

George W. Bush, as ardent a champion of secrecy as ever inhabited the White House, has been so often described as a “CEO President.”

By contrast, at least at the present moment, the value of openness originates most powerfully within the impulses of American culture. It is the realm of culture in which everyone is now seen – even if somewhat implausibly – to be equally the author of their own lives, in which boundaries between the realms of public and private are dissolving, and in which anything and everything is up for searching, digesting, and reprocessing.

When applied to government information, this idea may at first seem counterintuitive. It may seem more likely that values of openness in government develop most directly in the realm of the polity itself, rather than in culture. After all, American ideas of legitimacy turn pivotally on ideas of accountability, and accountability is typically associated in modern democratic theory with government transparency. One might expect, therefore, that democratic practice itself would provide the soil in which values of openness would take root most tenaciously.

The phenomenon I am discussing, however, is not an “either/or” proposition. Values of openness do appear conspicuously in our political realm, which emphasizes the importance of each citizen having his or her equal voice, rights to participation, and a claim to the attentive responsiveness of elected representatives.⁵³ Ideas supportive of openness – that each citizen is entitled to assess government performance for him- or herself, that information in government hands is public property, that secrecy is a threat to the rule of law and political accountability – all loom large in our political discussions.

As a source of values in contemporary America, however, the political order may readily be perceived as secondary to both the techno-economic and cultural realms. This is because the ways in which each realm of society contributes to individual identity depends substantially on actual experience in that realm. Each member of society is inevitably a participant in the rituals of culture on a daily, if not hourly basis; we are experiencing, on a near-continuous basis, cultural symbols, products, and messages with which we necessarily grapple to give our lives meaning and coherence. Moreover, the vast majority of adult citizens in society occupy themselves on a near-daily basis with activities directly linked to the techno-economic realm.

⁵³ See generally ROBERT A. DAHL, ON DEMOCRACY 35-61 (1998); Peter M. Shane, *The Electronic Federalist: The Internet and the Eclectic Institutionalization of Democratic Legitimacy*, in DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 65 (Peter M. Shane, ed., 2004).

Compared to these activities, individual experience of citizenship is thin. As observed by Bruce Ackerman and James Fishkin:

The rituals of citizenship have been stripped down to a precious few . . . [I]t is quite possible to live in America today without regularly dealing with others as fellow citizens – fellow workers or professionals, yes; fellow religionists or union members, yes; but fellow citizens, focusing on our common predicament as Americans? We may wave the flag, but we begin quickly to run out of citizenship activities.⁵⁴

Except for a minority who do participate regularly in the affairs of government or party politics, most Americans probably do not experience the political realm with sufficient intensity to shape their world view with the same vigor as the economy and culture. It is even true that Americans are more likely these days to understand the workings of the polity chiefly through cultural products. As I write this, there are three fictional American Presidents regularly appearing on network television dramas,⁵⁵ and increasing numbers of Americans learn about political issues through the monologues and commentaries of late-night television comedians.⁵⁶

But there is an additional reason why culture is now such a powerful social realm for the construction of identity. That is, we finally have information and communications technology that is congruent with culture's ambitions for the untrammelled self. Technology is thus key to our emerging reality and to my argument that the cultural realm is increasingly one in which "access to information" is understood and internalized as a natural condition of life.

Daniel Bell's characterization of contemporary culture is as resonant now as when written 30 years ago:

⁵⁴ BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 178-79 (2004).

⁵⁵ They are: Democratic President Jed Bartlett on NBC's *The West Wing*, political independent (elected vice-president, however, on a Republican ticket) Mackenzie Allen on ABC's *Commander-in-Chief*, and President Charles Logan, apparently a Democrat – he shares a top advisor with a Democratic predecessor – but with an uncanny physical resemblance to Richard Nixon, on Fox's *24*.

⁵⁶ PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *PERCEPTIONS OF PARTISAN BIAS SEEN AS GROWING – ESPECIALLY BY DEMOCRATS: CABLE AND INTERNET LOOM LARGE IN FRAGMENTED POLITICAL NEWS UNIVERSE 2* (2004), available at <http://people-press.org/reports/pdf/200.pdf> (last visited Feb. 16, 2006).

Modern culture is defined by [the] extraordinary freedom to ransack the world storehouse and to engorge any and every style it comes upon. Such freedom comes from the fact that the axial principle of modern culture is the expression and remaking of the “self” in order to achieve self-realization and self-fulfillment. And in its search, there is a denial of any limits or boundaries to experience. It is a reaching out for all experience; nothing is forbidden, all is to be explored.⁵⁷

In 1976, when Bell wrote these words, the notion of the self defying all limits or boundaries – especially for the “ordinary” person who had not self-consciously dedicated his or her life to artistic expression – might have seemed plausible primarily at a metaphorical level. Sitting in my room, I might have wished to put a classical sound track to a film of Korean folk dance, to superimpose the faces of contemporary politicians on Da Vinci’s picture of *The Last Supper*, or to create absurdist drama by extracting words from the Bible with a random number generator. These things, however, would have been difficult, if not impossible with the tools conveniently available. Today, they are literally child’s play. If my computer is on, I can download “The Folktales of Meandash: The Mythic Sami Reindeer,”⁵⁸ faster than I can look up “Lapland” in my dictionary. I can instantly acquire digital images of George W. Bush, Dick Cheney, and the actors in *Brokeback Mountain*, and combine them in satirical ways. I can acquire, manipulate, and republish at virtually no marginal cost a practically infinite array of texts, images, and sounds. It is no exaggeration that, with a good broadband connection, there is currently available to me within seconds more “information” than, prior to 1980, would probably have been found within the national libraries of most nations on earth. And, echoing Bell, “nothing is forbidden, all is to be explored.”

What is transformative about the technology, however, is not just what it permits us to acquire. Its revolutionary impact lies in its ability to change us into active creators of meaning. Perhaps the most widely discussed such phenomenon is “blogging,” the creation of individual “weblogs” or “blogs,” for short, that are a kind of individually

⁵⁷ CULTURAL CONTRADICTIONS, *supra* note 41, at 13-14.

⁵⁸ A January 23, 2006 Google search for the phrase “Folktales of Meandash: The Mythic Sami Reindeer” actually yielded 67 links. A representative site is <http://haldjas.folklore.ee/folklore/vol11/pdf/meandash.pdf> (last visited Feb. 16, 2006).

produced online magazine or journal. One online search engine, technorati.com, claims to cover 27 million of these productions,⁵⁹ and there is no reason to expect growth to slow.⁶⁰

Moreover, the phenomenon of “meaning creation” is not limited to what even its practitioners would presumably recognize as self-conscious authorship. To take what might seem to be a more mundane example – except that it is revolutionizing the music industry – the process of “downloading” music is steadily eroding the market for compilations of music in the forms of compact discs that are pre-arranged by professional producers.⁶¹ The capacity to organize one’s own music has not only made Apple’s iPod an industry-leading technology, but Apple invites subscribers to its “iTunes” downloading service to share the playlists of downloaded music they create. On the date of this writing, the iTunes web site made available 332,560 of these individually created playlists turning hundreds of thousands of individual listeners into the equivalent of radio program directors. No brief sampling can do full justice to the interpretive range of these creations, but the fact that one is called, “America Right or Wrong,” and another, “A Bitter Democrat’s Playlist” should give us some idea of the degree to which iMixers regard their enterprise as expressive of larger meanings.

Of course, not every blogger, iMixer, digital video artist, or webmaster will become a newly committed activist to the cause of government transparency, but my argument is a different one. It is that the increasingly widespread experience of cultural participation now enabled by digital technologies will all but inevitably erode the key conditions that make government secrecy seem natural and presumptively legitimate. I take these preconditions to be isolation, categorization, and authority.

First, the phenomenon of government secrecy depends on the capacity of those in authority to isolate sensitive information from the public domain. Such information must be maintained under secure circumstances. The sharing of such information must be subject to official permission and tight control. As more and more information is digitized, however, its security becomes increasingly problematic.

⁵⁹ Technorati.com, <http://www.technorati.com> (last visited Feb. 16, 2006).

⁶⁰ David Sifry, *State of The Blogosphere*, March 2005, Part 1: Growth of Blogs (March 14, 2005), <http://www.sifry.com/alerts/archives/000298.html> (last visited Feb. 16, 2006).

⁶¹ Urbannetwork.com, *Record Sales Suffer Steep Decline* (Jan. 4, 2006), *available at* <http://www.urbannetwork.com/cms/index.php?news=434> (last visited Feb. 16, 2006).

And – and this is the point where culture comes into play – the non-sharing of information seems increasingly alien to Americans. The proliferation of computers, cell phones, PDAs, and other devices has made the sharing of information, however private and idiosyncratic, seem the very point of having information in the first place. In this respect, the techno-economic sphere significantly reinforces the cultural impulse towards sharing. Online collaborative work is increasingly the norm. In both their private and public lives, people are increasingly alert to the additional value to be realized by collective information processing. Not only is it becoming increasingly difficult to quarantine information, but the activity of isolating information is itself increasingly suspect.

Second, government secrecy depends substantially on categorization. The very process of identifying and labeling information in a manner consistent with the level of its national security sensitivity is called “classification.”⁶² Such information is handled, in turn, by persons who are identified as having role-appropriate access by virtue of a precisely labeled security clearance. The more porous the boundaries between secret and non-secret, or between sensitive and routine, the more incoherent the secret-keeping enterprise threatens to become.

Digital culture, by contrast, is deeply hostile to informational boundaries. As but one of a great many possible examples, consider Carnegie Mellon University’s Studio for Creative Inquiry (SCI) in its College of Fine Arts. SCI’s website describes it as:

a center for experimental and interdisciplinary arts . . .
Founded in 1989, the Studio connects artistic enterprises to academic disciplines across the Carnegie Mellon campus, to the community of Pittsburgh and beyond. The Studio’s mission is to support creation and exploration in the arts, especially interdisciplinary projects that bring together the arts, sciences, technology, and the humanities, and impact local and global communities.⁶³

⁶² Peter M. Shane & Harold H. Bruff, *Separation of Powers Law: Cases and Materials* 711-714 (2d ed. 2005).

⁶³ Overview of Carnegie Mellon College of Fine Arts: Studio for Creative Inquiry, <http://www.cmu.edu/studio/overview/index.html> (last visited Feb. 16, 2006).

Among its art projects – and this project is not unusual for SCI – is an initiative called “3 Rivers, 2nd Nature.” The web site describes the project as follows:

This project addresses the meaning, form and function of the three river systems and 53 streams of Allegheny County, Pennsylvania in partnership with the 3 Rivers Wet Weather Demonstration Project. A team of artists, historians, botanists, Geographic Information Systems (GIS) specialists, landscape architects, scientists, engineers and water policy experts is developing an historic database, and a contemporary baseline of water quality, river edge plant life, bank conditions and the history of public access and private use. The team will also conduct a policy and value analysis of stormwater alternatives, stream restoration and stream daylighting.⁶⁴

It is impossible to perceive any difference between the kinds of information this art studio considers relevant to self-expression and the kinds of information environmental scientists seeking National Science Foundation funding would likely hope to amass. It is likely that Carnegie Mellon artists would be interested in obtaining the very kinds of information that the Environmental Protection Agency removed from its web site after September 11.⁶⁵

Perhaps, most basically, a secrecy system depends on the legitimacy of authority. It makes no sense for government to keep secrets unless the polity believes that certain individuals, by virtue of their position, have legitimate entitlements to information access that other citizens do not. The sources of such authority may be elected or appointed position, expertise, or some combination. Our cultural trajectory, however, threatens to erode such notions of authority simply by transforming us from passive recipients of messages into active, self-aware creators of meaning. If, as a web-surfer, I have sufficient authority over millions of cultural artifacts to be able to subject them to my manipulation, commentary, republication, and so on, the idea that there is information over which I am not entitled to exercise some share of dominion is going to come with greater difficulty.

⁶⁴ Current Projects of Carnegie Mellon College of Fine Art: Studio for Creative Inquiry, <http://www.cmu.edu/studio/projects/index.html> (last visited Feb. 16, 2006).

⁶⁵ Podesta, *supra* note 4, at 13.

Pressed too far, these connections may seem like a stretch. But I am not trying to make a reductionist argument that people who think they are entitled to shuffle their iPod or create art out of chemical risk maps will reject out-of-hand the idea that their government can keep nuclear secrets or conduct clandestine national security investigations. I am urging something subtler, namely, that the ever-more routine cultural activities of meaning creation, enabled and sustained by our infinitely networked technology, will make increasingly unnatural the idea that only a few people are entitled to know things about the state of the world that are massively important to our health, security, and well-being, and about which we must remain ignorant. One would expect that defenders of secrecy would have, culturally speaking, a harder time of it in the long-run, and that the strong strain in popular culture that favors category blasting, information sharing, and self-authoring will strengthen allegiance to values of access to information and government transparency in the political sphere.⁶⁶

III. INTRODUCING THE SYMPOSIUM

One can see the conflicting impulses at work in this policy domain within this special issue of I/S, including the commentary by Ryan Lozar (noted above) on the impact of federal secrecy on state and local government. In "Secrecy as Mystification of Power: Meaning and Ethics in the Security State,"⁶⁷ attorney and writer Paul Gowder argues for a normative view of public information policy that would regard secrecy as an assault on our existential freedom. Precisely because information barriers limit our capacity to create meaning, Gowder says we should be wary of philosophical defenses of secrecy that are based on utility. "[S]ecrecy," he writes, "cloaks the effects of secrecy,"⁶⁸

⁶⁶ Professor Edward Lee has argued that there are strong conceptual and doctrinal connections between the idea of the "public domain" as it arises in public information law and the idea of the "public domain," as elaborated in intellectual property law. He worries that government measures limiting the public domain in the area of government secrecy may coincide with assertions of copyright law to remove cultural works from the public domain, with catastrophic, "democracy-disabling" results. Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L. J. 91, 209 (2003). Lee's analysis reinforces my argument that the realms of culture and polity are linked, and that values rooted in the former domain may legitimate or subvert policy arguments urged in the latter.

⁶⁷ Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 ISJLP 1 (2006).

⁶⁸ *Id.* at 24.

thus defeating the only condition under which a genuinely democratic polity could rationally deliberate whether secrecy is legitimate and thus create legitimate conditions for its pursuit.

By way of contrast, in "Normative Dimensions of Paternalism and Security,"⁶⁹ lawyer and political scientist Lisa Nelson argues that paternalistic government policies may be justified if necessary to preserve liberty in the face of potential harm. She reports on a pilot survey seeking to understand the conditions under which citizens might approve paternalistic policies. Her findings suggest that the respondents did not judge the acceptability of paternalism entirely by the magnitude of harm sought to be avoided. Rather, they also considered the degree to which they would experience the government's paternalistic action as a constraint on their liberty, whether the interference with their liberty could be persuasively linked with the potential of forestalling harm, and whether conditions generally warranted trust and confidence in government.⁷⁰ This framework suggests a public information ethic more instrumental in nature than Paul Gowder would prefer, but still significantly attuned to the relationship of information to individual liberty. It is also intriguing to note that the paternalism at issue in Professor Nelson's survey involved government acquisition of personal data about citizens, not secret-keeping per se. It is not clear that her tentative findings are generalizable across this entire domain. To the extent secrecy diminishes trust and confidence in government, the public is less likely, even under Nelson's rubric, to acquiesce in the legitimacy of paternalistic action.

In "Terrorism in the Information Society: Implications for Biosecurity and Federal Secrecy Policy,"⁷¹ Brian J. Gorman assesses the complex forces militating for and against openness in the context of biosecurity policy. While he states the importance of not arming would-be bioterrorists with science helpful to their goals,⁷² Professor Gorman likewise notes the dilemma that all science, presumably including science in pursuit of biosecurity, "advances at its greatest pace in an open environment where findings are accessible,

⁶⁹ Lisa J. Nelson, *Normative Dimensions of Paternalism and Security*, 2 ISJLP 27 (2006).

⁷⁰ *Id.* at 35.

⁷¹ Brian J. Gorman, *Terrorism in the Information Society: Implications for Biosecurity and Federal Secrecy Policy*, 2 ISJLP 53 (2006).

⁷² *Id.* at 78.

transparent and replicable by any interested party.”⁷³ Noting the increasing difficulty of maintaining secrecy in a world in which personal biolabs may be as easy to obtain as personal computers, Professor Gorman calls for a new paradigm of information sharing in the realm of science so that undue secrecy does not inhibit security advances.⁷⁴ His analysis strongly implies that the conceptualization of information policy in dichotomous terms – public versus private, secret versus open – may not be sufficiently fluid to capture the social processes under which information is optimally managed to protect us from harm.

The final commentary in the symposium, “Using Open Internet Standards to Provide Greater Access in a Post-9/11 World,”⁷⁵ argues directly that government should take advantage of new technologies to enhance, rather than restrict public access to information. Attorney Ari Schwartz implicitly urges advocates of openness to go beyond campaigns for the absence of legal restriction on information acquisition. Instead, government should recognize and implement the capacity of technology to make information more reliable and more easily retrievable across traditional agency boundaries.

IV. CONCLUSION

Given the horrors of September 11 and the President’s pre-existing penchant for enhancing executive authority, the Bush Administration’s accelerated push for secrecy hardly seems surprising. What seems more remarkable are the limited political traction of arguments on behalf of government secrecy and the continued push for new initiatives that would make public information yet more readily available. Because some kinds of secrecy inevitably make life easier for people and institutions in power, advocates of openness need always be vigilant. But the direction of the realm of culture in post-industrial society may help in their cause. This is not to say that campaigns on behalf of secrecy are doomed to fail, that every claim for secrecy lacks adequate justification, or that the individualist strain in our culture, imported wholesale into our political life, is always an

⁷³ *Id.* at 58.

⁷⁴ *Id.* at 82.

⁷⁵ Ari Schwartz, *Using Open Internet Standards to Provide Greater Access in a Post-9/11 World*, 2 ISJLP 125 (2006).

unalloyed good.⁷⁶ But the fact remains that information and communications technologies are enabling and sustaining an unprecedented degree of active participation in the creation of culture and of social meaning, and thus fostering conditions under which secrecy regimes are likely to seem yet more alien and unnatural in the information society. For better or worse, the idea that a few people are entitled to know things essential to our individual and collective well-being, about which the rest of us must remain ignorant, is likely being undermined by the values of our culture, with the prospect that this same idea is likely to face more ardent challenges in the world of politics as well.

⁷⁶ Although this subject goes beyond the scope of this essay, there is certainly reason to wonder whether it is helpful to democracy, a process for collective self-governance, if the ideal of the "untrammeled self" is imported too uncritically into the realm of the policy. When the military recruits volunteers with the slogan, "An Army of One," or e-government initiatives tout the promise of "Your Government, Your Way," we ought perhaps to worry that we are losing sight of what collective self-governance is really about. Especially intriguing, however, is the fact that the technology that facilitates individual pursuit of the "untrammeled self" so powerfully is, at its essence, networked technology based on sharing. As individuals become increasingly alert to the prospects for cooperative gain, one wonders what the impact on older notions of individualism will be. *See generally* HOWARD RHEINGOLD, SMART MOBS: THE NEXT SOCIAL REVOLUTION (2002).

